Supreme Court, U.S.
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No. 97-715

In The

Supreme Court of the United States

October Term, 1997

HECTOR GUERRA,

Petitioner,

vs.

MARY ANN CARLO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In light of *Sandin v. Conner*, ("Sandin") 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) and *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), has a misdemeanor arrestee, who a jury has found to have been intentionally denied a requested telephone call without justification, to contact either an attorney, bail bondsman or family, been deprived of a protectable liberty interest under the Fourteenth Amendment?

2. Does being denied a telephone call, pursuant to a state statute which specifically confers this right on an arrestee for purposes of contacting an attorney, bail bondsman or family, while being held in custody for over 12 hours on a misdemeanor offense, constitute an "atypical and significant hardship" on that arrestee under *Sandin*?

3. Is the Court of Appeals recognition of a clearly-established liberty interest alone, without defining the process that is due to protect the interest, but recognizing that the process in the case was constitutional, merit review by this Court in light of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d. 494 (1985)?

4. Is a governmental official entitled to qualified immunity when that official was found by the jury to have deliberately denied an arrestee a protectable liberty interest which was clearly established at the time of the incident, and no reasonable official would have denied such a right?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding in the courts below. The parties to this proceeding are Respondent, Mary Ann Carlo, and Petitioner, the Watch Commander for the San Bernardino County Jail, Hector Guerra.

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This Petition seeks review of a Ninth Circuit decision which reinstated a jury verdict in favor of the Respondent for violation of her constitutional rights. Specifically, all parties agree that the jury found that the Respondent's civil rights, under 42 U.S.C. § 1983, were violated, when the Petitioner intentionally, and without justification, denied "her access to a telephone while she was jailed after her arrest on charges of driving while under the influence of alcohol." (App. A2 to Petition for Writ of Certiorari, hereinafter "Pet. App."). The Petitioner was the Watch Commander at the jail during the time of her detention. Shortly after the Petitioner went off duty, the Respondent was brought to a hospital for treatment of injuries and returned to the jail at about 2 p.m. the following day, when she was finally granted the use of the telephone. (Pet. App. A3).

The District Court overturned the jury's verdict and granted judgment as a matter of law for the Petitioner, finding no protectable interest in the right to a telephone call, even though the state statute clearly indicated it conferred such a right on an arrestee. The Ninth Circuit reversed the District Court, finding a protectable interest, and reinstated the verdict.

SUMMARY OF ARGUMENT

The Petitioner in this case was found liable for violating the Respondent's civil rights, not when he denied the Respondent an immediate post-booking telephone call, but when he continually refused, without justification, to allow the Respondent access to a phone over a period of five hours. (Petition at 2). Thereafter, the denial of the telephone calls continued well into the afternoon — until 2:00 p.m., when the Respondent was returned from the hospital. (Pet. App. A3).

The denial of access to a telephone call, in this circumstance, constitutes a tangible and substantial threat to a arrestee's access to the Sixth Amendment right to counsel, and the Eighth Amendment guarantee of the right to post reasonable bail. In fact, the jury found that the denial was intentional and without justification. The Ninth Circuit affirmed the jury's finding that such a denial violates an arrestee's protectable liberty interest.

The Petitioner's assertion that the Ninth Circuit has resurrected the "Mandatory Language Test" of pre-*Sandin* cases misrepresents the holding of the Ninth Circuit and of *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). In fact, *Sandin* dealt with the claim of a convicted prisoner, not an arrestee. This Court, in *Sandin*, specifically drew a distinction between arrestees, pretrial detainees, and post-conviction prisoners, leaving open the possibility that the Mandatory Language Test, set out in *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864 (1983), may still apply to cases other than those involving convicted prisoners. The Ninth Circuit was following this court's directive in that regard.

In any event, the Ninth Circuit also applied the "atypical and significant hardship" test of *Sandin*, and found that it was an "atypical hardship" to deny an arrestee the right to access the sole means of contacting an attorney, bail bondsman, or family member while being held in custody — a telephone. Since the jury found that the Respondent was, essentially, held "incommunicado" by the Petitioner, the court found that the denial was a "significant hardship." Moreover, a telephone call would have allowed the Respondent to seek needed medical attention, consult with an attorney or family members, and preserve evidence on her behalf.

The assertion by the Petitioner that the Court of Appeals somehow allowed state law to define the due process in this

case is without support. In fact, the Court of Appeals held only that, under existing Supreme Court case law, a protectable liberty interest was identified. The Court of Appeals balanced the interests at stake, pursuant to controlling Supreme Court precedent, and found that the complete denial of a telephone call violated due process. Clearly, the jury weighed the defenses that the Petitioner had with regard to his reasons for not giving the Respondent access to a telephone call, and found that his reasons were not justified.

The Petitioner's attempt to bias this Court against the Ninth Circuit, by asserting that it is "Constitutionalizing" state law, is pure sophistry, since it is this Court that has repeatedly held that Fourteenth Amendment liberty

> interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from and independent source such as state law. . . ."

Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 538, 105 S. Ct. 1487 (1984) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972)). *See also Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552 (1980) and *Sandin*, (recognizing that States may indeed create liberty interests which are protected by the Due Process Clause of the Fourteenth Amendment). *Id.* 115 S. Ct. at 2300. The argument that the Court is constitutionalizing state law is an inflammatory argument without substance in this case. Moreover, by denying an arrestee access to a telephone to post bail, the Petitioner, *de facto*, denies the detainee the Eighth Amendment right to reasonable bail by not allowing her to contact a bail bondsman or family member to post the bail. Additionally, by denying a arrestee access to a telephone to contact an attorney, the Petitioner, *de facto*, denies the detainee the Sixth Amendment

right to have the assistance of counsel for his defense, which would include the potential of preserving evidence.[1]

REASONS FOR DENYING THE WRIT

I.

THE PETITION MISREPRESENTS THE COURT OF APPEALS DECISION REGARDING THE METHODOLOGY FOR IDENTIFYING A PROTECTABLE LIBERTY INTEREST.

Remarkably, the Petition claims that the Court of Appeals has resurrected a "dead" case and applied it to the facts of this case. The Petitioner, apparently believes that *Sandin* overruled *Hewitt*. This notion is easily dispelled by the very language of *Sandin*, which specifically stated that *Hewitt* was not overruled, and the ruling in *Carlo*.

A. Hewitt's Mandatory Language Test Is Still Controlling Law In This Context.

Even a cursory reading of *Sandin* reveals that this Court left intact the *Hewitt* case outside the context of convicted prisoner claims. This Court specifically indicated that its decision in *Sandin*, applied solely to incarcerated prisoners. In fact, this Court's analysis, in leading up to the abandonment of the methodology "made explicit in *Hewitt*," dealt virtually exclusively with challenges asserted by sentenced inmates searching for technical rules violations. The specific departure from *Hewitt* in only those types of cases was clear and unequivocal. Clearly, *Hewitt* is not "dead," especially when addressing claims of prearraignment arrestees. In departing from *Hewitt*, in the context of a convicted prisoner's claim, this Court stated that

1. This is not an exhaustive list of the liberty interests at stake in such a circumstance.

> [t]he punishment of incarcerated prisoners, on the other hand serves different aims than those found invalid in *Bell* [*Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)]. . . . The process does not impose retribution in lieu of a valid conviction. . . .

Sandin, 115 S. Ct. at 2301. More specifically, this Court distinguished *Bell* as "deal[ing] with the interests of arrestees and not convicted prisoners." *Id.* 115 S. Ct. at 2300. *Carlo* acknowledged this explicit language in *Sandin* — language which is completely ignored in the Petition.[2] Hence the Ninth Circuit followed the dictates of *Sandin* in evaluating this case. The Ninth Circuit did not stop there, however. The court also evaluated *Carlo* under the new methodology set forth in *Sandin*. (*See, infra*, Point I, Part C). Consequently, the perceived conflict with Supreme Court precedent, vis a vis *Carlo*, is non-existent and provides no reason for the Court to grant this Petition.

More forcefully, this Court should deny the Petition, since it has already fully and adequately set out the methodology to be used in evaluating claims, by prearraignment arrestees, asserting state law created liberty interests. In *Sandin*, importantly, this Court reiterated its "concern that a State would attempt to punish a detainee for a crime for which he was indicted via preconviction holding conditions." *Sandin*, 115 S. Ct. at 2300. As a result of this concern, this Court has reaffirmed its position that arrestee incarceration is to be more strictly scrutinized. Given the Court's long-standing recognition that a "detainee 'may not be punished prior to an adjudication of guilt in accordance with due process of law,' " such an approach is understandable and appropriate. *Sandin*, 115 at 2300 (citing

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2. The Ninth Circuit recognized that this Court abandoned the reasoning in *Hewitt*, "at least to convicted prisoners" but "explicitly did not over rule it." (Pet. App. A12).

Bell, 441 U.S. 520, 535, 99 S. Ct. 1861, 1871-1872, 60 L. Ed. 2d 447 (1979)). Consequently, the Mandatory Language test is appropriately applied in a case where the danger exists that punishment might be meted out on an unarraigned pretrial arrestee. Such a rule is consistent with Supreme Court precedent, and follows the dictates of *Sandin*.

B. The Reasons For Abandoning The Hewitt Test, As Detailed In *Sandin*, Are Inapplicable To *Carlo*.

The justification for, and bases upon which this Court relied, in abandoning the Mandatory Language Test in the context of a "rule-violation" case filed by a convicted prisoner is totally inapplicable to the circumstance of an unarrraigned arrestee. By way of overview, this Court recognized three problems with the *Hewitt* test in the context of a convicted-prisoner case: (1) the prison regulations were not designed to confer rights upon prisoners, but "to guide correctional officials in the administration of the prison" (*Sandin*, 115 S. Ct. at 2299); (2) prison officials are encouraged to avoid creating "liberty" interests by "having scarcely any regulations or by conferring stewardless discretion" on its personnel. Such a negative incentive jeopardizes the security and safety of the institution (*Id.*); and (3) the federal courts will become intricately involved in the day-to-day operation of the prisons under such a test (*Id.*).

With regard to concern number (1), the State law telephone-call statute *is* specifically designed to confer a right on the arrestee. Specifically, by its language, the statute (California Penal Code § 851.5) states that the "arrestee has the right" to make the telephone calls. More importantly, however, the statute specifically recognizes that the telephone calls are fundamental to the exercise of the arrestee's right to post reasonable bail through family, friends or a bail bondsman, and the right to contact counsel, court-appointed or privately retained, to

preserve evidence, seek advice, or otherwise get assistance. Without the telephone call, the arrestee, by the very fact that he is incarcerated, is denied those Constitutional rights which distinguish this country's fundamental Constitutional guarantees.

With regard to concern number (2), the finding of a Constitutionally protected liberty interest in the statute will not encourage prison officials to seek to avoid regulation, since this statute is not a regulation designed to facilitate the administration of the prison, but is, instead, a "procedural protection . . . of quite a different nature." *Id.*, 115 S. Ct. at 2299. As such, this provision is designed solely to benefit the prisoner and to enable the arrestee to exercise rights that would otherwise have no meaning without the telephone call.[3]

Additionally, arrestees, contrary to the assertions in the Petition, are not going to be "combing" jail regulations to uncover some denial of a "mandatory" right. The "right to a telephone call" necessarily occurs within the initial hours of an arrest, whereafter a pretrial detainee, unable to make bail, will be brought before a magistrate for arraignment and bail review.[4]

With regard to concern number (3), the federal courts will not become intricately involved in the day-to-day operation of the prisons, since this right necessarily, as stated before, deals not with the administration of the prison, but with ensuring

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3. In fact, while it may beg the question, the elimination of this right would in all likelihood (*i.e.*, should) be unconstitutional, since it would effectively (*de facto*) deprive arrestees of their rights under the Sixth and Eighth Amendments.

4. The logical extension of such an argument would be that the prison officials might be encouraged to eliminate attorney conference rooms so that they would not have to worry about conferring on the prisoner the right to meet with counsel at the jail. Of course, the Court, respectfully, would not allow this to happen.

that a arrestee is guaranteed access to his or her Sixth and Eighth Amendment rights. Otherwise, in all likelihood, these rights would have no meaning in the critical hours immediately following an arrest, when they are most needed. There is no legitimate reason to be concerned that this right to a telephone call would more involve the Court's in the administration of the prison than any other guarantee under the Bill of Rights. In other words, the courts will not be more involved in the day-to-day operations of the prisons, because it requires the jail to give a arrestee access to the outside world (necessary to the exercise of a detainee's rights) on a limited basis.[5]

C. The Manner Of Application Of The Sandin Test Is Consistent With The Supreme Court's Ruling.

Even if the *Sandin* test were to be applicable to this case, the Ninth Circuit has adequately addressed the relevant issues. The Petitioner in this case would have this Court hold that the courts can only identify liberty interests on a case by case basis. Such a reading is unwarranted. The Petitioner misreads *Sandin* on this point. This Court did not hold that the liberty interest depends on the particular nature of the deprivation in light of the particular circumstances of a particular inmates confinement. (Petition at 10). Such a rule would require the federal courts to

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5. The Petition seeks to distract the Court from the true issue involving pretrial detainees by focusing on language from cases that indicate a jail (holding arrestees) can be as dangerous as a prison (holding convicted prisoners). The right to provide the telephone call necessarily carries with it the right to a qualified immunity defense if a reasonable officer in such a position could have believed that his denial of the phone call was appropriate. For example, where there exist dangerous conditions in the jail during the time in question, or other circumstances render it impossible in the eyes of a reasonable official. Such can be asserted early on in the litigation in a qualified immunity defense. *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993).

micromanage all institutions to determine whether, under the particular circumstances of an inmate's confinement, a liberty interest exists. The Court has set forth a bright line rule with regard to the existence or non-existence of Constitutionally protected liberty interests. This Court stated

> . . . States may under certain circumstances create liberty interests which are protected by the Due Process Clause. (Citation) But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, (Citation), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin, 115 S. Ct. at 2300. What is crucial is not that the "atypical and significant hardship" is imposed in relation to the particular circumstances of a particular inmates confinement, but "in relation to the ordinary incidents of prison life." *Id.* After an exhaustive review of the circumstances surrounding, not the particular inmate's life necessarily, but of the "ordinary incidents of prison life," this Court determined that the punishment of sentenced prisoners for disciplinary conduct, serves prison management and rehabilitation and is "within the expected parameters of the sentence imposed by a court of law." *Id.*

Moreover, the discipline in *Sandin* "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." *Id.* at 2301. Here, in *Carlo*, however, the right to the telephone calls *are*, as stated before, fundamental to the exercise of the arrestee's right to post reasonable bail through family, friends or a bail bondsman, and

the right to contact counsel, court-appointed or privately retained, to preserve evidence, seek advice or otherwise get assistance. In fact, the statute, by its own language, guarantees legal protection against what *is* an atypical, significant deprivation — the holding of an inmate "incommunicado" — "in which a state might conceivably create a liberty interest." The language of the statute clearly indicates that the State did, indeed, intend to create a liberty interest: the statute clearly bestows the right to a telephone call; the statute envisions that the inmate will telephone a lawyer, bail bondsman or family member for assistance, and, in fact, limits that calls to those people for those purposes; and, finally, the statute makes it a misdemeanor for a government official to violate the telephone call provisions. The statute could not be clearer in its intent to bestow the right upon arrestees to make phone calls to obtain assistance.[6]

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6. The Petitioner's accusation that the Ninth Circuit's analysis of "hardship" was "off-handed" and, so, inadequate, is unnecessarily disparaging and unfounded. The Ninth Circuit examined the right consistent with the directive of this Court in *Sandin*. It is the Petitioner who misreads this *Sandin*. Additionally, the further unnecessarily disparaging accusation that the Respondent was combative is irrelevant given the jury's finding that the Petitioner intentionally violated her rights without justification. The Respondent need not assert every Constitutional violation subsumed within the denial of a telephone-call claim to prevail on this theory. After all, maybe her bail was not excessive, or perhaps she did everything an attorney would have told her to do. The courts cannot decide the *existence* of a Constitutional right based on the particulars of every case — only whether it was violated.

II.

THE PETITION MISREPRESENTS THAT THE COURT OF APPEALS DECISION DETERMINES THAT A STATE STATUTE DEFINES DUE PROCESS.

The Petitioner fails to recognize the qualitative difference between due process cases which require that evidentiary hearings be conducted and cases whereby the Court identifies the particular liberty interest. At issue in *Carlo* was whether California Penal Code § 851.5 created a constitutionally protected liberty interest. As indicated above, the Court of Appeals held that such an interest was created under either the *Hewitt* or *Sandin* tests. (Pet. App. A7). Carlo never argued that the process under the statute was inadequate, only that the violation of the statute was a violation of her constitutional rights. *Id.* Consequently, the Court did not need to "define what process was due under the Constitution." (Petition at 16).

The Petitioner, Respondent asserts, deprived her of a protected liberty interest without any process at all, much less due process; such a deprivation is a Constitutional violation without regard to the definition of what process should be due. That is the holding of the Ninth Circuit. While the courts have, in certain circumstances, defined what procedure need be implicated to protect the right, *Mathews v. Eldridge*, 424 U.S. 319, 334-5, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), this is a case, where the government's interest is clearly outweighed by the interest of the arrestee, such that the liberty interest must be guaranteed within the confines defined by the California statute. In fact, that is what the Ninth Circuit held, that the

> California statute (requiring notice of the right to telephone calls and permitting the denial of a requested immediate phone call only in the case of

> physical impossibility) is sufficient to satisfy constitutional due process.

(Pet. App. A7). The assertion contained in the Petition, that the process should be defined, should be left to another case, where that issue clearly comes before the court.

This perceived failure to identify and define the process due is not grounds for the granting of this Petition. To characterize the Ninth Circuit's desire to refrain from dicta as "a sharp departure from this Court's procedural due process decisions" is hyperbole at best, but more appropriately described as wrong.

III.

THE PETITION MISREPRESENTS THE COURT OF APPEALS DECISION AS CONSTITUTIONALIZING STATE LAW.

Of course, as discussed above, and as the Ninth Circuit correctly pointed out,

> [t]he Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

(Pet. App. A7). The Petitioner's assertion, then, really has no meaning.

It is also clear that California intended to bestow the right upon an arrestee to telephone calls within a certain amount of time, given certain limitations. Respondent submits that such is

a protectable liberty interest under the Fourteenth Amendment. Additionally, Carlo argues that the Petitioner provided inadequate process in violating the terms of the statute. (Pet. App. A7). Such a liberty interest cannot be denied an arrestee without due process of law. *Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

IV.

THE PETITIONER'S CLAIM THAT CONFLICTS EXIST AMONG CIRCUIT COURTS OF APPEAL IS EXAGGERATED AND INSUFFICIENT TO WARRANT THE GRANTING OF THE PETITION.

Since this Court's recent decision in *Sandin*, which abandoned the methodology developed in a fairly long line of cases, only two Supreme Court terms have passed. Invariably, the circuits will wrestle with a new methodology set out by this Court. Not enough time has passed for this Court to determine that a ripe and direct conflict exists in this area sufficient to warrant review.

A majority of the circuits in the Country have not weighed in on this issue. Moreover, those circuits that have issued opinions have held true to the language of *Sandin*. In fact, the cases cited in the Petition reveal that the circuits are following the dictates of *Sandin*. *See Watson v. City of New York*, 92 F.3d 31 (2nd Cir. 1996) (specifically recognizing that *Sandin* abandoned the *Hewitt* methodology in prisoner cases); *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995) (specifically applying the *Sandin* methodology); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995) (again applying the *Sandin* methodology). The Petitioner's assertion that there exists a conflict among the circuits on all of the issues discussed in the Petition and that such is ripe and direct is untenable.

V.

THE PETITION MISREPRESENTS THE COURT OF APPEALS DECISION ON QUALIFIED IMMUNITY.

The Petitioner's assertion that the Ninth Circuit is looking to state law for determining whether a federally protected right is clearly established is a blatant misrepresentation. The Ninth Circuit specifically followed *Davis v. Scherer*, 468 U.S. 183 (1984), when it recognized that "the clearly established right [must] be the federal right on which the claim for relief is based." (Pet. App. A15).

What is omitted from the Petition is any reference to the clear statement in *Davis* that

> neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation — of state of federal law — *unless* that statute or regulation provides a basis for the cause of action sued upon.

Id. 468 U.S. 194, n.12, 104 S. Ct. 3019 (emphasis added).

Given the fact that the California statute was the basis upon which the liberty interest arose, *i.e.*, the State statute created the liberty interest which is entitled to procedural protections of the Due Process Clause of the Fourteenth Amendment (*Vitek v. Jones*, 445 U.S. 480, 488 (1980)), the federal law guaranteeing the right not be deprived without due process was clearly established at the time of the incident.[7]

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7. As in *Anderson v. Romero*, 72 F.3d 518 (7th Cir. 1995), the Petitioner misunderstands the argument herein, thinking that the Respondent is asserting a federal right, per se, to a telephone call.

(Cont'd)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(Cont'd)

> Not so; the source of the entitlement is a state statute; federal law merely protects [the Respondent] against having his [liberty interest] taken away . . . without due process of law. There is no novelty to this claim. . . . .

Id. at 527.

Additionally, to the extent that the court believes that the right to telephone call rises to a liberty interest per se, "Courts have recognized detainees' and prisoners' first amendment right to telephone access" in the Ninth Circuit, for over ten years. *See Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (citations omitted). The right to a telephone call is so intricately tied to Sixth and Eighth Amendment rights, that it is almost folklore that an arrestee is entitled to a telephone call.